

When an out-of-State mail order company has any representative in Illinois performing a function that aids or enhances the mail order sales, then the company has nexus and is required to register as an Illinois Use Tax collector. See 86 Ill. Adm. Code 150.201(i) and 150. 801(c). (This is a GIL).

October 19, 1999

Dear Xxxxx:

This letter is in response to your letter dated July 2, 1999 that we received on July 15, 1999. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120(b) and (c), enclosed.

In your letter, you have stated and made inquiry as follows:

We are writing this letter on behalf of a client to request information about sales tax laws in your state. Our client operates a mail order catalog business and wants us to investigate the sales tax ramifications of selling merchandise in your state. Our client does not have an office in your state, however they do enter your state to do some resurfacing work. This process involves stripping bowling lanes, sanding the wood, and then reapplying oil and wax to the wood. Our client estimates that they spend less than seven days out of the year doing the resurfacing work in your state. We would like a written response as to whether or not our client would have any sales tax liability on either the catalog sales and/or resurfacing work they do in your state. Also any additional information you could send in regards to your sales tax laws would be appreciated.

Your letter says your client makes catalog sales into Illinois and also performs resurfacing work by stripping and refinishing bowling lanes. Based upon that activity you ask whether the client would have any sales tax liability. Determinations about nexus are normally very fact dependent. As noted above, we cannot issue a binding determination about sales/use tax nexus in the context of a General Information Letter. Even if we were able to do so, we lack sufficient information about your client's catalog sales to make a determination regarding the catalog sales. However, in general, when an out-of-State mail order company has any representative in Illinois performing a function that aids or enhances the mail order sales, then the company has nexus and is required to register as an Illinois Use Tax collector.

Under Illinois law a construction contractor is one who takes tangible personal property and incorporates it permanently into real estate. The contractor is considered the end-user of the tangible personal property and owes Use Tax upon its cost of such items. See 86 Ill. Adm. Code 130.1940 and 130.2075, enclosed. When your client enters Illinois and performs resurfacing work on bowling alleys we understand it makes repairs to real estate. As such, we consider this to be a construction contractor situation and the client would incur Illinois Use Tax liability at the rate of 6.25% on the wood oil, wax, and other tangible personal property incorporated into the wood. The client's tax base is its cost price of such materials and a credit would be available for any sales/use tax properly paid to another State.

Regarding the catalog sales, we hope the following descriptions of Illinois retailers and out-of-State Use Tax collectors will be useful. An "Illinois Retailer" is one who either accepts purchase orders in the State of Illinois or who sells items of tangible personal property which are located in Illinois at the time of sale. The Illinois retailer is then liable for Retailers' Occupation Tax on gross receipts of sales and must collect the corresponding Use Tax incurred by purchasers. Please refer to 86 Ill. Adm. Code 130.605(a).

Out-of-State sellers who fall under the definition of a "retailer maintaining a place of business in this State" (see 86 Ill. Adm. Code Sec. 150.201(i), enclosed), must register to collect Illinois Use Tax from Illinois customers and remit that tax to the Department. See 86 Ill. Adm. Code Sec. 150.801(c), enclosed. The retailer must collect and remit Use Tax to the State on behalf of his Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability on those sales.

The provisions of this regulation are subject to the recent U.S. Supreme Court ruling of Quill v. North Dakota, 112 S. Ct. 1902 (1992), in which the Supreme Court set forth guidelines for determining what nexus requirements must be met before a business is properly subject to a state's tax laws. Quill invoked a two-prong analysis consisting of 1) whether the Due Process Clause is satisfied, and 2) whether the Commerce Clause "substantial nexus" test is met before the state can impose tax collection responsibilities.

The due process test will be met if requiring the retailer to collect state sales tax is fundamentally fair to the retailer. If the retailer intentionally avails itself of the benefits of the taxing state's economic market, then due process is satisfied, Quill at 1910.

Notwithstanding the fact that due process has been met, a business must also have a physical presence in the taxing state in order for the "substantial nexus" test to be met under the Commerce Clause and before a state can impose tax collection responsibilities on an out-of-State retailer. A physical presence does not mean simply an office or other physical building. Under Illinois tax law, it also includes the presence of any representative or other agent of the seller. The representative need not be a sales representative and it is immaterial for tax purposes that the representative's presence is temporary.

ST 99-0319-GIL
Page 3
October 19, 1999

Due to the fact that your client would have representatives physically present in Illinois performing resurfacing work, your client would be subject to Illinois Use Tax registration and collection responsibilities because the physical presence requirement would be met so long as the presence of these representatives aids or enhances the catalog sales in any manner.

I hope this information is helpful. The Department of Revenue maintains a Web site, which can be accessed at www.revenue.state.il.us. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of the enclosed copy of Section 1200.110(b).

Very truly yours,

Karl W. Betz
Associate Counsel

KWB:msk
Enc.